Legislation Mandates Fact-Finding For MMBA Agencies

By William F. Kay and Janet Cory Sommer

California’s Legislature passed and sent to Governor Brown a bill that would amend the MMBA to establish mandatory fact-finding for local agencies that have reached negotiations impasse. AB 646 would require fact-finding very similar to the procedures required for school employers under the EERA and for higher education employers under HEERA. If Governor Brown signs this legislation, it will:

- Require the appointment of a three-person fact-finding panel, if a mediator is unable to resolve the differences within 30 days of appointment, and if the employee organization requests fact-finding; and

- Require an appointed fact-finding panel to investigate, hold hearings, and issue findings of fact and recommendations covering the unresolved issues through the application of eight listed criteria, including most significantly: (1) comparability in wages with other public agencies; (2) the agency’s financial ability; (3) the change in the Consumer Price Index; and (4) local rules, regulations or ordinances;

- Require the parties to share equally the costs of the process, including the expenses of the neutral chair of the fact-finding panel;

---

1 Fact-finding is an advisory and non-binding form of interest arbitration. The local agency and the employee organization each appoint a panel member, and PERB appoints a neutral arbitrator as the chair of the fact-finding panel. To persuade the fact-finding panel that specific statutory criteria support their respective negotiation proposals, the local agency and the employee organization present testimony, documentary evidence, and arguments to the fact-finding panel. The fact-finding panel must consider specific criteria and recommend final contract terms and language based on the panel’s application of that criteria. You can read Fact-Finder Decisions on PERB’s Web site at [http://www.perb.ca.gov/decisions/fact.asp](http://www.perb.ca.gov/decisions/fact.asp).

2 Government Code Sections 3540, et seq. and 3560, et seq.
• Provide the fact-finding panel’s recommendations as advisory to the negotiating parties; and

• Allow the employer, after holding a public hearing, to unilaterally adopt its last, best, and final offer (LBFO) no earlier than 10 days after the fact-finding report is made public.

The fact-finding requirements do not apply to bargaining units in charter cities and/or counties covered by binding interest arbitration.

We have attached a full copy of AB 646.

Preliminary Questions

1. Will Governor Brown sign this legislation?

Unless he changes his mind, we believe Governor Brown is likely to sign this legislation. October 9 is the last day for the Governor to sign or veto the legislation.

2. Because the legislation does not alter the MMBA section on voluntary mediation, can a local agency avoid fact-finding and mediation if its local rules do not allow for mediation or if the agency opts not to proceed to mediation?

In what appears to be a major drafting flaw, current MMBA Section 3505.2, which allows for mutual agreement for appointing a mediator, was left untouched, leaving open the question whether this new impasse procedure is voluntary. The legislation inserts a section following Section 3505.2 stating, “[I]f the mediator is unable to effect settlement of the controversy within 30 days after … appointment, the employee organization may request the parties’ differences be submitted to a fact-finding panel.”

Because of the drafting flaw, local agencies may be able to successfully argue that mediation requires mutual agreement under Government Code 3505.2, and without mutual agreement to appoint a mediator, an agency can avoid fact-finding. If fact-finding can be avoided, questions arise about whether the local agency will still be able to unilaterally adopt. Unless the Legislature resolves these questions in the next legislative session, litigation will almost certainly ensue.

3. What happens if a union does not request fact-finding? Will union’s decision not to request fact-finding preclude the agency from unilaterally implementing its last, best, and final offer?

The legislation allows only the union, and not the employer, to request fact-finding. Under new Section 3505.7, unilateral adoption of an LBFO can only occur after the applicable mediation and fact-finding procedures are exhausted, and no earlier than 10 days after the submission of the fact-finding report. Unions may attempt to avoid or delay unilateral implementation by declining to request fact-finding.
4. Who will fund the additional costs of mediation and fact-finding for the state and the local agencies?

Sections 3505.5(b) and (c) of the new language requires that the union and employer share the expenses of the fact-finding chairperson. Section 3505.5(d) requires that, “other mutually incurred costs shall be borne equally by the public agency and the employee organization” and that the cost for the panel member selected by each party shall be paid by that party.

5. When will this legislation become effective? Will it cover negotiations currently underway?

This legislation would become effective January 1, 2012, and would cover MMBA impasses after that date.

6. Will PERB be required to certify whether the parties are at impasse as PERB does under the EERA and HEERA, or will the MMBA negotiating parties still determine when they are at impasse?

Under the EERA and HEERA, either party can declare an impasse and PERB determines whether or not a true impasse exists. Under the MMBA, there is no provision for PERB certifying the existence of impasse. Impasse exists when “further negotiations would be futile.” If the MMBA parties do not agree upon the existence of an impasse, then the matter is decided by PERB through a claim of bad faith bargaining, or premature impasse declaration. This legislation does not change the MMBA process.

If you are opposed to AB 646, please send Governor Brown a letter or e-mail message asking him to veto AB 646. Please feel free to use this model request.